FOR ARGUMENT

No. 87-645

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

F. CLARK HUFFMAN, *et al.*,
Petitioners,

v.

WESTERN NUCLEAR, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR AMICUS CURIAE NATIONAL TAXPAYERS UNION

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This Brief is submitted on behalf of amicus curiae National Taxpayers Union ("NTU") pursuant to Supreme Court Rule 36.

INTEREST OF AMICUS CURIAE NTU

The ultimate question which petitioners Huffman, et al. (hereinafter referred to as the "Department of Energy" or DOE") and respondents Western Nuclear, Inc., et al., tender this Court on this appeal is whether, under § 161v. of the Atomic Energy Act ("AEA"), 42 U.S.C. 2201v., there must be limitations on the enrichment of

foreign-source uranium for domestic end-use. NTU [1] takes no position on this ultimate issue. However, resolution of this issue can have a profound and inextricable impact on an issue, also arising from § 161v. and also presented in the proceedings below, which is of overriding importance to NTU. This closely related question involves the requirement of AEA § 161v. that DOE recover all the costs of its civilian uranium enrichment program from its customers.

If DOE fails to recover the costs of its civilian enrichment program as provided in AEA § 161v., the burden of providing enrichment services (essential to produce nuclear fuel) will fall on U.S. taxpayers. The clear intent of the cost recovery requirement of § 161v. is to preclude any such taxpayer subsidy. Since the inception of the civilian enrichment program, DOE nevertheless has failed to recover at least $8,800,000,000 ($8.8 billion).[2] DOE now asserts authority to "write-off" any portion of that amount which it deems "appropriate." [3]

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[1] NTU is a non-profit public interest organization with 150,000 members dedicated, inter alia, to eliminating unnecessary subsidies and fostering efficient administration of government services. NTU participated as an amicus curiae in the proceedings below and in the 1986 rulemaking on which Petitioners Huffman, et al., rely in their opening brief.

[2] Total "unrecovered costs" stood at approximately $7.5 billion at the end of September, 1985. *See* 51 Fed. Reg. 3624 (Jan. 29, 1986) (DOE admission). The amount had grown to $8.8 billion by early 1987. Statement of Keith Fultz (General Accounting Office) before Energy & Power Subcomm. of the House Energy and Commerce Comm., released April 8, 1987, entitled "The Future of DOE's Uranium Enrichment Program" at p. 1.

[3] One manifestation of this claimed authority is the agency's "utility services enrichment contract" ("USEC"), which the district court below invalidated on procedural grounds, with the court of appeals remanding for a determination on standing and for review of the substantive question whether the contract complies with the full cost recovery requirement of § 161v. The other manifestation of DOE's claimed authority not to recover costs is the agency's July 1986 "enrichment criteria," in which DOE professes to be able to balance cost recovery with other goals, and admits that it is "writing off" all but $3.5 billion of past unrecovered costs.

DOE has recently purported to "write-off" all but about $3.4 billion of the total amount owed by the enrichment program to the Treasury as "unrecovered costs." Amicus NTU opposes the "write-off" as unlawful under § 161v. and as an unwarranted taxpayer subsidy contrary to the letter and intent of § 161v.

Some of the arguments employed by DOE to vindicate its position that it should not limit enrichment of foreign-source uranium for domestic end-use (as Western Nuclear, Inc., contend is required by AEA § 161v.) are the same as the arguments which the agency employs to support its position that it need not recover its costs as required by AEA § 161v. To the extent this Court addresses these arguments, litigation and policies relating to the full cost recovery provision of § 161v. will be affected.

THE STATUTORY BASIS FOR THE ENRICHMENT PROGRAM

A. AEA § 161v.

AEA § 161v. contains important substantive and procedural requirements governing the uranium enrichment program conducted by DOE. The two substantive requirements which the proceeding below has thus far involved are: (1) the requirement that DOE recover the costs of its civilian enrichment program in a reasonable period of time; and (2) the requirement that DOE limit enrichment of foreign-source uranium to the extent necessary to assure the maintenance of a viable domestic uranium industry.

The chief procedural requirement of AEA § 161v. involved in the proceedings below is that DOE operate its

civilian enrichment program in accordance with "written criteria," which criteria cannot be changed unless they have first been submitted for 45-days to the Joint Committee on Atomic Energy.[4] The congressional oversight and control which this requirement afforded [5] was largely eviscerated when the Joint Committee was abolished and

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[4] In the litigation below, the district court found that DOE's new generic enrichment contract violated the "written criteria" requirement of AEA § 161v. in that, among other things, the "ceiling price" provided in the generic enrichment contract conflicted with the then-extant enrichment criteria from which such a provision "was deliberately deleted in 1973 because of concern that a ceiling price could preclude compliance with the statutory directive that the government must recover its costs over a reasonable period of time." *Western Nuclear v. Huffman*, D.Colo. 84-C-2315, Sept. 19, 1985, slip op. 3, citing *Proposed Changes in AEC Contract Arrangements for Uranium Enrichment Services, Hearing before the Energy Subcomm. of the Jt. Comm. on Atomic Energy*, 93d Cong., 1st Sess. 446 (1973). Under 42 U.S.C. § 7181(b)(3), DOE must now comply with rulemaking requirements in revising its enrichment criteria. DOE responded to the district court's order relating to the generic enrichment contract by conducting a speedy rulemaking to repeal its old enrichment criteria and to purportedly afford itself authority to deviate from the statutory full cost recovery requirement. DOE argued that the new criteria (which the agency admitted mirrored the new generic enrichment contract) mooted all issues with respect to the contract, including those relating to full cost recovery. The Tenth Circuit correctly noted that the substantive claims against the enrichment contract were not resolved by the new enrichment criteria and that the issues with respect to DOE's enrichment contract were accordingly not moot. 825 F.2d at 1434. The Tenth Circuit remanded for a finding on the standing of the uranium producers to contest the generic enrichment contract. 825 F.2d at 1437.

[5] This Court in *Power Reactor Dev. Co. v. International Union*, 367 U.S. 396, 408-09 (1961) noted the special deference due an interpretation of the Atomic Energy Act by the Atomic Energy Commission (DOE's predecessor) because of the close oversight of the Commission afforded by the Joint Committee. *See also* Green, *The Joint Committee on Atomic Energy: A Model for Legislative Reform*, 32 Geo. Wash. L. Rev. 932, 939 (1964).

its jurisdiction split among at least a half dozen Senate and House authorizing committees.

B. Cost Recovery under AEA § 161v.

AEA § 161v. provides that prices established for the civilian enrichment program "shall be on the basis of recovery of the Government's costs over a reasonable period of time . . . ." This language was specifically adopted by Congress in 1970 in affirmation of an opinion by the General Accounting Office (GAO) that DOE's predecessor, the Atomic Energy Commission, must recover the full costs of the civilian uranium enrichment program. These costs included depreciation of assets, imputed interest on the outstanding balance, and operating expenses.[6]

GAO has subsequently repeatedly indicated that under AEA § 161v. DOE is legally obligated to recover all program costs, and can*not* take unilateral "write-off's." In an opinion letter dated December 27, 1984, GAO stated that

> "After careful analysis of the statute . . ., [w]e conclude that a write-off for pricing purposes of undepreciated plant and capital equipment, so as to obviate the need for customer payments of related depreciation as part of the fee for enriching services, violates the statutory mandate of subsection 161(v) of the Atomic Energy Act of 1954, as amended, *supra*, requiring cost recovery for Energy's enrichment program." [7]

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[6] *See, e.g., Uranium Enrichment Services Criteria and Related Matters, Hearings before the Jt. Comm. on Atomic Energy*, 88th Cong., 2d Sess. 31 (AEC statement that full cost recovery is required by statute even prior to 1970 amendment), 287-88 & 522 (proposed and final criteria embodying full cost recovery) (1966).

[7] GAO B-207463, Letter to Chairman R. Ottinger, Dec. 27, 1984, at p. 20.

When DOE issued its new written "enrichment criteria" in response to this litigation and in order to purportedly authorize a "write-off," GAO similarly ruled [8] that DOE's new criteria were beyond its authority in that they violated the full cost recovery provision in AEA § 161v.[9] GAO stated that "Energy is in legal error in this matter." [10] GAO explained that

> "in the reports [H.R. Rep. No. 1470, 91st Cong., 2d Sess. 2 (1970); S. Rep. No. 1247, 91st Cong., 2d Sess. 2 (1970)] of the Joint Committee on Atomic Energy associated with the 1970 amendment, the Joint Committee explicitly affirmed a GAO legal interpretation [B-159687] of the meaning of subsection 161(v) as the Committee's intended meaning of the new statutory language requiring 'recovery of the government's costs over a reasonable period of time.' GAO's opinion required recovery of costs in every instance save one [which is not applicable here]. . . . Consequently, under the 1970 amendment to subsection 161(v) and its legislative history, full cost recovery is required." [11]

In a letter to Chairman Udall on April 14, 1987, GAO again reiterated that DOE has "written off" some $4 billion in unrecovered enerichment costs "to reduce its

[8] GAO B-207463, Letter to Chairman Markey, Feb. 19, 1986, at p. 1, reprinted in *DOE Enrichment Program, Hearing before the Energy Cons. & Power Subcomm., Energy & Comm. Comm.*, 99th Cong., 2d Sess. 170 (1986).

[9] This ruling was foreshadowed in GAO's earlier December 27, 1984, opinion where GAO noted that DOE could not legalize a "write-off" by modifying the then-extant enrichment criteria: "If [Government enrichment] assets are to be written-off, Congress must amend the [Atomic Energy] Act. A criteria change would not suffice, since the criteria must be in accord with the statute." GAO Letter to Chairman Ottinger, *supra*, at p. 22.

[10] GAO B-207463, Letter to Chairman Markey, Feb. 19, 1986, at p. 3; 1986 Hearings, *supra*, at 172.

[11] GAO B-207463, Letter to Chairman Markey, *supra* at pp. 4-5, 1986 Hearings, *supra*, at 173-74.

enrichment price to what it believes to be a competitive level. However, we do not believe that under existing legislation DOE has the legal authority to do this." [12]

In sum, DOE lacks power to "write-off" unrecovered costs or to otherwise operate the civilian enrichment program on the basis of direct or indirect taxpayer subsidy. The General Accounting Office has repeatedly so determined. *Accord, United States v. Consolidated Edison Co. of New York*, 452 F. Supp. 638, 657 (S.D.N.Y. 1977), *aff'd*, 580 F.2d 1122 (2d Cir. 1978) (DOE's uranium "enrichment program is required by statute to recover its costs").

DOE has nevertheless purported to "write-off" billions in unrecovered enrichment costs, has purported to include a "ceiling price" guarantee in its generic enrichment contract which unlawfully precludes recovery of these costs,[13] and has issued new "enrichment criteria" which purport to authorize it to "write-off" additional past costs, as well as costs incurred in the future.[14]

The basic dispute over DOE's legal obligation under AEA § 161v. to recover costs turns on the language and legislative history of the statute germane to these matters. As GAO has repeatedly pointed out, the statute and its history are clear and mandatory in this regard.

[12] Letter, GAO to Chairman Morris Udall, House Committee on Interior and Insular Affairs, April 14, 1987, at p. 5.

[13] For the reasons stated by GAO, the "ceiling price" provision is *ultra vires* and cannot bind the government. "[W]hen an agent of the government enters a contract that does not satisfy statutory or regulatory conditions, the courts cannot bind the government to the contract." *Augusta Aviation, Inc. v. United States*, 671 F.2d 445, 449 (11th Cir. 1982). *See also Schweiker v. Hansen*, 450 U.S. 785, 788 (1981); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 386 (1947).

[14] 51 Fed. Reg. 27133 (1986).

In the proceedings below, the uranium producers (Western Nuclear, et al.) have taken a similar position with respect to the language and intent of the separate uranium viability proviso in § 161v. In its opening Brief and in its Petition for Certiorari, DOE claims that the language of the viability proviso and its history do not support the uranium producers' position. On this basic legal dispute concerning the uranium viability proviso, NTU takes no view, except to note that for the reasons stated by GAO, DOE has an undeniable and mandatory duty to recover all other costs of the civilian enrichment program.

DOE, however, also raises a number of "policy" arguments for why it should be allowed to refuse to limit enrichment of foreign-source uranium. The agency in related litigation and in other contexts uses some of these arguments to support its position that it should not recover the costs of its enrichment program as well. For the reasons stated below, these "policy" concerns either are totally unsubstantiated or are irrelevant. They should not be credited by this Court.

SUMMARY OF ARGUMENT

DOE argues that the mandatory substantive requirement in AEA § 161v. requiring full cost recovery should be construed in non-mandatory fashion in order to facilitate the agency's efforts to price below-cost, to thereby subsidize enrichment service prices in a vain effort to maximize market share, and to pursue various other administrative goals. DOE offers similar arguments in response to the argument of the uranium producers that the agency must limit enrichment of foreign-source uranium for domestic end-use. DOE in both cases claims that it may lose business; that it can no longer implement the key substantive requirements of AEA § 161v. without such risk of business loss; and that all requirements of § 161v. should accordingly be construed as discretionary on the part of the agency.

DOE's current argument does not comport with the intent of Congress or constructions of the statute adopted by DOE's predecessor (the Atomic Energy Commission). With regard to full cost recovery, DOE lacks discretion to ignore the cost-recovery requirement in favor of unilateral engagement in forced subsidization of its program by taxpayers. In any event, market conditions are such that DOE can*not* lose any significant business through implementation of substantive requirements of § 161v. and, even if serious losses were a reasonable possibility, the agency has ample power under various provisions of the AEA to require U.S. utilities to obtain enrichment services domestically in order to assure implementation of all substantive policy requirements of § 161v. If DOE wishes now to operate the federal government's enrichment program outside the substantive guidelines provided in AEA § 161v., it must seek a congressional repeal of that provision.

ARGUMENT

1. In support of DOE's view that its obligations under AEA § 161v. should be interpreted as discretionary rather than mandatory, the agency claims that actions such as limiting enrichment of foreign uranium for domestic end-use, or recovering Government enrichment costs may have the affect of raising DOE enrichment prices. This, the agency hypothesizes, may possibly cause some DOE enrichment customers to go to foreign enrichment suppliers for services. *See, e.g.*, DOE opening Brief at 14-15,[15]

[15] Not surprisingly, nuclear utilities, which have an obvious economic interest in lowering nuclear fuel costs through federal subsidies if they can get away with it, make similar kinds of claims and protestations to encourage DOE, inter alia, to "write-off" costs and to charge below cost prices. There is a special irony involved here. Nuclear utilities, which all along have acknowledged an ultimate duty as DOE customers to bear the costs of the enrichment program, were strong supporters of the investments in new plant and equipment, the "write-off" of which they now demand of DOE. For example, in 1974, the utility trade association (Edison Electric

citing assertions in the 1986 rulemaking preamble.[16]

DOE's conjecture concerning losses is contrived, imaginary, and misleading. In any event, it is belied by the facts at several levels. First, the U.S. is, according to the former director of DOE's enrichment program, the lowest cost enrichment producer in the world with a virtual lock on the U.S. market (the world's largest).[17] Second, the U.S. dollar has depreciated significantly against the currencies not only of the other enrichment supplier nations (chiefly France through Eurodif/Cogema and Germany through Urenco) but also of foreign countries (e.g., Japan) which are potential enrichment purchas-

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Institute), in urging more federal investment, testified that "the economic penalties that would be imposed by a shortfall of enrichment capability far exceed the costs that would be associated with temporary oversupply." *Future Structure of the Uranium Enrichment Industry, Hearings before the Jt. Comm. on Atomic Energy*, 93d Cong., 2d Sess. 175 (1974). Supporting the $10 billion federal centrifuge enrichment program in 1978 against GAO objections, the utilities testified that "the need to proceed rapidly with the planned . . . plant is urgent and cannot be overemphasized." *Uranium Enrichment Policy, Hearings before the Energy Res. & Dev. Subcomm. of the Senate Energy & Nat. Res. Comm.*, 95th Cong., 2d Sess. 80, 87, 444 (1978). *See also id.* at 75 & 88 (full cost recovery admitted). The utilities continued support until further construction of the centrifuge was deferred in favor of development of yet another supposedly more promising enrichment technology. *See Uranium Enrichment Policy, Hearings before the Energy Cons. & Power Subcomm. of the House Energy & Power Comm.*, 98th Cong., 1st & 2d Sess. 315-26 (1983-84).

[16] DOE's reliance on the rulemaking is misplaced. None of the "evidence" DOE tries to derive from the rulemaking is part of the record below on the merits decisions by the district court. Moreover, reliance on the rulemaking is blatant bootstrapping. The agency has simply made unsubstantiated assertions in a preamble and then has cited those assertions in a Brief in another context.

[17] For example, "[DOE] now enjoy[s] the largest market share, lowest production cost, and most advanced technology development effort of any supplier." Letter, Dep. Assistant Sec'y Longenecker (enrichment) to DOE Secretary Herrington, August 4, 1987.

ers.[18] Third, there is insufficient capacity available abroad to support any significant diversion of business from DOE. The two European government enrichment consortia (which are Eurodif and Urenco) lack significant excess capacity according to publicly available data from DOE and analysts at the Congressional Budget Office (CBO).[19] Moreover, it would take 7 to 10 years for a foreign government to build significant additional capacity.[20] Countries which may elect to build new capacity will do so for political reasons (to secure domestic control over an energy resource) or for military purposes; and not because of current DOE prices.[21] In any event, it is crystal clear that at the current time and at least until the latter half of the next decade, DOE is and will

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[18]

Currency	1985 Av.	Feb. 25, 1988	%
franc (Eurodif)	8.985	5.709	−36.5
d-mark (Urenco)	2.944	1.687	−42.7
yen (Japan)	238.54	128.15	−46.3

[19] According to CBO numbers, which generally conform to DOE figures (*see Proceedings of the Tri-Committee Business Advisory Panel on Uranium Enrichment, Hearings before the Int. & Ins. Affairs Comm.*, 98th Cong., 2d Sess. 51-52 (1984)), there are 5 to 6 million SWU's per year of excess capacity in Europe in the late 1980's, eroding to 2 or 3 million SWU's by 1990. However, there are approximately 6 million SWU per year of "uncommitted demand" for that period. CBO, *U.S. Uranium Enrichment: Options for a Competitive Program* 15 (Eurodif and Urenco capacity static), 17 (Eurodif demand at 8 million SWU), & 14 (uncommitted demand) (1985). A more recent study by the Congressional Research Service (Library of Congress) indicates that foreign commitments and options *already* equal or exceed foreign supply capabilities. R. Civiak (CRS) to Senator Humphrey, at 1-2 (Feb. 24, 1988).

[20] *E.g., Proposed Changes in AEC Contract Arrangements for Uranium Enriching Services, Hearings before the Energy Subcomm. of the Jt. Comm. on Atomic Energy*, 93d Cong., 1st Sess. 24 (1973); Civiak (CRS), *supra*, at 3 (eight years for Urenco to add significant capacity).

[21] *E.g., Tri-Committee Business Panel, supra*, at 83 (testimony of Chairman of NUEXCO).

be the "marginal producer" with the only significant excess capacity available. As such, it possesses sufficient market power to establish higher prices for its services in order to carry out § 161v.

2. If DOE were to charge higher prices to recover its costs (or, by analogy, by limiting enrichment of foreign uranium for use in the U.S. in favor of more expensive domestic uranium), and if this were to cause a significant loss of business to DOE, the agency has a ready remedy: it can require U.S. utilities to purchase their enrichment services domestically, either directly or in conjunction with action by the Nuclear Regulatory Commission (which has licensing authority over, *inter alia*, civilian nuclear reactors and imports of enriched uranium). DOE tends to ignore this authority. However, the predecessor of the DOE and NRC, namely, the Atomic Energy Commission, repeatedly acknowledged that it possessed authority under the AEA to require domestic utilities to obtain their enrichment services from the Government enrichment program in order to maintain a viable domestic *enrichment* program, address foreign unfair competition, or otherwise implement AEA § 161v.[22] That the federal agencies possess broad power under provisions of the AEA like AEA §§ 161b., p., & i., 42 U.S.C. 2201b., p. & i., cannot be denied. *Westinghouse Elec. Corp. v. NRC*, 598

[22] *E.g.*, *Private Ownership of Special Nuclear Materials, Hearings before the Legis. Subcomm. of the Jt. Comm. on Atomic Energy*, 88th Cong., 1st Sess. 29-30 (1963); *Proposed Modification of Restrictions on Enrichment of Foreign Uranium for Domestic Use, Hearings before the Jt. Comm. on Atomic Energy*, 93d Cong., 2d Sess. at 8, 232-33 (1974). Although the Atomic Energy Commission was split into the Energy Research and Development Administration (ERDA) (later DOE) and NRC in 1974, nothing in that change altered the substantive authorities under the Atomic Energy Act, and both NRC and DOE share authority under key provisions such as AEA §§ 161b. & p., 42 U.S.C. 2201b. & p. *See* H.Rep. 93-707 at 27; S. Rep. 93-980 at 84 (1974) (reports on Energy Reorganization Act).

F.2d 759, 771 (3d Cir. 1979) (broad authority under referenced provisions). NRC has acknowledged in written answers to questions that it can act to limit importation of enriched uranium upon request by DOE in order to facilitate the latter's discharge of § 161v.[23] In short, DOE can implement full cost recovery under AEA § 161v., or take other required actions which might be viewed as raising prices, without risk of loss of business, because the government has ample authority to require domestic use of DOE enrichment facilities. DOE's claims about lack of such authority are revisionist in extreme; they are belied by the legislative history and by prior constructions of the statute by DOE's predecessor; and they are contrary to the position taken by DOE's sister agency. *See INS v. Cardoza-Fonseca*, 107 S.Ct. 1207, 1221 n.30 (1987). DOE's claims that potential business loss might flow from implementation of AEA § 161v. simply cannot be credited.

3. DOE's position that compliance with AEA § 161v. should be subservient to other policy goals, such as, in the case of cost recovery, subsidized nuclear fuel prices, is ultimately an issue for Congress. DOE must obtain Congressional approval, in the form of an amendment to § 161v., to deviate from such a clearly expressed mandatory requirement as full cost recovery. In the meantime, the agency must take all available measures to comply with the statute. Put another way, DOE and the economic interests (such as the nuclear utilities appearing as amici in this proceeding) point to "problems" with the federal uranium enrichment enterprise. However, the statute unequivocally prohibits DOE from "solving" its problems at the expense of the U.S. taxpayer. To do that, Congress must amend the statute.

[23] Answers of NRC attached to Opposition to Emergency Motion for Stay filed by Amici States in the Tenth Circuit in the proceeding below.

CONCLUSION

DOE is unlawfully failing to recover the costs of its enrichment program in violation of AEA § 161v. Although this issue is not currently before this Court, it is one of the issues which will be dealt with on remand, and it is an issue in at least one other proceeding.[24] Resolution of this issue may turn on this Court's handling of the uranium viability proviso, and especially certain of DOE's arguments in connection with this proviso. In addressing the arguments in DOE's Brief, this Court is cautioned against reliance on any of the unsubstantiated claims made in DOE's bootstrapping preambles to its 1986 enrichment regulations, which are either legally incorrect or lack any factual or record basis, which are under judicial review elsewhere, and which in any event violate AEA § 161v. and are therefore matters for Congress.

Respectfully submitted,

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[24] *See Duke Power Co. v. Department of Energy*, 830 F.2d 359 (D.C. Cir. 1987) (transferring challenge to DOE's 1986 enrichment criteria to federal district court).